No. 83-1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LACY H. THORNBURG, *et al.*,

Appellants,

v.

RALPH GINGLES, *et al.*,

Appellees.

On Appeal From the United States District Court for the Eastern District of North Carolina

---

APPELLANTS' BRIEF

LACY H. THORNBURG
Attorney General

*JERRIS LEONARD
KATHLEEN HEENAN MCGUAN
LEONARD & MCGUAN, P.C.
900 17th Street, N.W., Suite 1020
Washington, D.C. 20006
(202) 872-1095

JAMES WALLACE, JR.
Deputy Attorney General for Legal Affairs
TIARE B. SMILEY
NORMA S. HARRELL
Assistant Attorneys General
Attorney General's Office
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-3377

Attorneys for Appellants

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

I. Whether Section 2 of the Voting Rights Act entitles protected minorities, in a jurisdiction in which minorities actively participate in the political process and in which minority candidates win elections, to safe electoral districts simply because a minority concentration exists sufficient to create such a district.

II. Whether racial bloc voting exists as a matter of law whenever less than 50 percent of the white voters cast ballots for the black candidate.

PARTIES TO THE PROCEEDING BELOW

The Appellants, defendants in the action below, are as follows: Lacy H. Thornburg, Attorney General of North Carolina; Robert B. Jordan, III, Lieutenant Governor of North Carolina; Liston B. Ramsey, Speaker of the House; The State Board of Elections of North Carolina; Robert N. Hunter, Jr., Chairman, Robert R. Browning, Margaret King, Ruth T. Semashko, William A. Marsh, Jr., members of the State Board of Elections; and Thad Eure, Secretary of State.

TABLE OF CONTENTS

TABLE OF CONTENTS continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 83-1968

LACY H. THORNBURG, *et al.*,

Appellants,

v.

RALPH GINGLES, *et al.*,

Appellees.

On Appeal From the United States District Court for the Eastern District of North Carolina

APPELLANTS' BRIEF

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of North Carolina in this case was rendered on January 27, 1984. A copy of the Court's Opinion and Order is set out in the Jurisdictional Statement at Appendix A.

JURISDICTION

The case below was a class action by black voters of North Carolina challenging certain districts in the post-1980 redistricting of the North Carolina General Assembly. The appellants filed their Notice of Appeal on February 3, 1984. This Court noted probable jurisdiction on April 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES

The United States Constitution, Fifteenth Amendment, and Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973, 1973c are set forth in the Jurisdictional Statement at 59a. The following provisions of the North Carolina Constitution are not contained in the Jurisdictional Statement:

Art. II, § 3(3), N.C. Const.

> "No county shall be divided in the formation of a senate district."

Art. II, § 5(3), N.C. Const.

> "No county shall be divided in the formation of a representative district."

STATEMENT OF THE CASE

The Genesis of the Challenged Redistricting Plans

In July of 1981, the North Carolina General Assembly enacted a legislative redistricting plan in order to conform the State Senate and House of Representative Districts to the 1980 census. In keeping with a 300 year old practice in the State, the plans consisted of a combination of single member and multimember districts and each district was composed of either a single county, or two or more counties, so that no county was divided between legislative districts. The plaintiffs below filed this action on September 16, 1981 in the United States District Court for the Eastern District of North Carolina alleging among other things, that the multimember districts diluted black voting strength.

In October 1981, in a special session, the General Assembly repealed and reworked the House plan to

reduce the population deviations. Because forty of North Carolina's 100 counties are covered by Section 5 of the Voting Rights Act, the revised House plan and the Senate plan were submitted to the Attorney General for review.[1] The Attorney General interposed objections to both proposals. He found that the state policy against dividing counties resulted in the creation of multi-member districts which in turn tended to submerge black voters in the covered counties.[2]

---

[1] Section 5 of the Voting Rights Act requires covered jurisdictions to either submit any voting change to the Attorney General of the United States or to file suit in the United States District Court for the District of Columbia for declaratory judgment. Section 5 provides in pertinent part:

> Whenever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . 42 U.S.C. § 1973c.

[2] In 1968, as part of a general revision of the State Constitution, a provision prohibiting the division of any county between State legislative districts was adopted. Art. II, §§ 3(3), 5(3) N.C. Const. This Constitutional amendment merely codified a practice which had been consistent and unbroken in North Carolina redistricting since the institution of legislative districts in the colonial perod.

B. The finding of vote polarization is not foreclosed by the mere fact that blacks have won a few elections.

The District Court, using vote polarization only as one factor in its vote dilution analysis, was correct in holding that a few black victories did not, of themselves, prevent the Court from finding vote polarization.

Section 2 of the Voting Rights Act does not protect minority voters only when they are completely shut out of the electoral process. Rather, it bars any practice that creates a climate in which minorites have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

Congress made it clear that a few black victories did not foreclose a vote dilution claim. In its discussion of token black victories, no mention was made of the fact that black victories foreclose a finding of polarization. S. Rep. at 29, n.115 and at 194. Because all of the *Zimmer* factors are mutually independent, a finding that one factor is absent or inapplicable cannot preclude the finding that another is present and critical; therefore, simply because a few blacks win, this does not rebut the separate factor of vote polarization. As a result, the District Court looked for, and found, overall patterns within each district which indicated that citizens in the district consistently voted along racial lines.

Thus, even when blacks win, a pattern of polarization can still be evident. If 90% of the blacks vote for a black candidate and only 25% of whites do so in a district with a population less than 62% white, the black candidate will

win. It is clear that, in this example, vote polarization did not cost the black the election; it should, however, be obvious that significant racial polarization was present. It should be equally obvious that vote polarization can exist in a district when the Court examines other elections in which blacks do lose. One or two black victories cannot make up for a host of black losses. To the extent that Congress indicated its awareness that, in many vote dilution cases, there would be some black victories, it would be erroneous to say that random victories prevent the Court from finding the presence of such an important factor as vote dilution.

In fact, the State's various contentions in this regard constitute a logical morass. It argues that, if the lower Court used an erroneous definition of vote polarization, the Court's decision must be overturned. Implicit in this argument is the principle that vote polarization is integral to a finding of vote dilution. If this were true, however, its argument that black victories preclude the Court from finding vote polarization fails. If black victories defeat a finding of vote polarization, which in turn prevents the Court from holding that black votes are diluted, then the congressional mandate (S. Rep. at 29) that a few black victories do not defeat a vote dilution claim is thwarted.

III. EVEN IF THE LOWER COURT DID NOT ARTICULATE THE PROPER DEFINITION OF VOTE POLARIZATION, THE RECORD IS REPLETE WITH FACTS SUPPORTING THE COURT'S FINDING OF IMPERMISSIBLE VOTE DILUTION.

In *White v. Regester*, 412 U.S. 755, this Court found vote dilution without making a finding of vote polarization. This case is especially pertinent because even the

State concedes that it was Congress' intent to codify the Court's analysis in *White* into the 1982 amendments to the Voting Rights Act. S. Rep. at 22-24. (App. Brief at 16-18) This Court in *White* upheld a District Court's invalidation of multi-member districts in Texas and its resulting order to have them redrawn as single-member districts. The Court justified this holding "[b]ased on the totality of the circumstances." *White*, 412 U.S. at 769.

Specifically, the plaintiff in *White* claimed that the use of multi-member districts was invidiously cancelling or minimizing the voting strength of racial groups in Dallas and Bexar Counties. 412 U.S. at 765. This Court held that, in order to sustain such a claim, the "plaintiff's burden is to produce evidence to support findings that the political process leading to nomination and election were not equally open to participation by the group in question— that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766 (citation omitted).

In examining the multi-member district in Dallas County, this Court outlined the types of evidence that would meet the quoted standard and thereby enable the plaintiffs in a vote dilution case to prevail. It was enough that the District Court examined the official history of racial discrimination, the white dominated political organization which was unresponsive to the needs of minorities, the use of racial campaign tactics and the limited electoral success of blacks. 412 U.S. at 766. The Court also found that Texas election rules, such as a majority vote rule and the "place" rule, which required candidates to run in head-

to-head contests, "enhanced the opportunity for racial discrimination." 412 U.S. at 766.

The findings in *White* are remarkably similar to those of the Court below in this case.[20] It is critical that, in *White*, two blacks had been elected from the multi-member

---

[20] The only factor not present in the case at bar and found in *White* is of minor importance. The *White* court found the presence of "a white-dominated" slating organization which "did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community." *White*, 412 U.S. at 766-767.

However, "[u]nresponsiveness is considerably less important under the results test." *United States v. Marengo County*, 731 F.2d 1546, 1572 (11th Cir. 1984). In *Marengo*, the appeals court held that the District Court's finding of "no 'substantial lack of responsiveness'" of officials should not weigh heavily against a finding of dilution. 731 F.2d at 1573. The *Marengo* court made two arguments. "First, Section 2 protects the access of minorities not simply to the fruits of government but to participate in the process itself." 731 F.2d at 1572. In other words, even if the needs of minorities are catered to superficially, this fact does not rebut evidence that minorities are excluded from full and equal opportunity to participate in the political process. Second, in contrast to the other *Zimmer* factors, "responsiveness is a highly subjective matter and this subjectivity is at odds with the emphasis of Section 2 on objective factors." 731 F.2d at 1972.

Furthermore, although this one "slating" factor from the *White* case is absent from the instant case, there is an additional factor in this case not present in *White*. When the lower Court in *White* examined Dallas County, it found that "[i]n consequence of a long history, only recently alleviated to some degree, of racial discrimination in public and private facility uses, education, employment, housing and health care, black registered voters of the State remain hindered, relative to the white majority, in their ability to participate effectively in the political process." (J.S. at 26a) The Court in *White* did not find that this factor was present in Dallas County but did state it was an important factor in Bexar County, which contained the other challenged district. 412 U.S. at 768.

district in Dallas County and impermissible vote dilution was still found. Similarly, the District Court in *White* found vote dilution in Bexar County even though *five* Mexican-Americans had been elected from that multi-member district. *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972), *aff'd in part sub nom. White v. Regester*, 412 U.S. 755 (1973). Thus, as is argued above, the elections of a few blacks negates neither vote polarization nor the propriety of a finding of impermissible vote dilution.

In summary, *White* found vote dilution without a finding of racial polarization. The court in *White* based its holding on the same findings that the lower Court relied upon here. The only factor not present here is of minimal importance and is more than offset by the additional factor of socio-economic inequality. Consequently, this Court should, as it did in *White*, find that "these findings and conclusions are sufficient to sustain the District Court's judgment with respect to the . . . multi-member districts . . ." 412 U.S. at 767.

CONCLUSION

The lower court's holding that House District 8 (Edgecombe, Nash, Wilson) and Senate District 2 (northeastern North Carolina) violate Section 2 should be affirmed on either of two grounds: first, that the notation of probable jurisdiction does not cover the State's appeal as to them; second that together with the other *Zimmer* factors present, the fact that no black has ever been elected to a legislative seat from those districts clearly establishes that the

political processes in those districts was not and is not equally open to minorities.

The lower Court's holding that House Districts 36 (Mecklenburg), 39 (Forsyth), 23 (Durham), 21 (Wake) and Senate District 22 (Mecklenburg/Cabarrus) violate Section 2 should be affirmed because minorities there have neither an equal opportunity to participate in the political process nor an equal opportunity to elect representatives of their choice in that, among other circumstances, (a) prior and current racial discrimination has resulted in dramatically lower voter registration percentages for blacks, (b) elections there are marred by persistent and severe racially polarized voting and (c) only a paltry number of blacks has ever been elected to the legislature from these districts.

Respectfully submitted,

*C. ALLEN FOSTER
KENNETH J. GUMBINER

FOSTER, CONNER, ROBSON & GUMBINER, P.A.
104 North Elm Street
Greensboro, North Carolina 27401
(919) 273-1733

Attorneys for Appellees/Intervenors

**Counsel of Record*

August 1985